subject property lot to be developed with a 60-foot residential building and the C-2-C portion to be developed to 90 feet. He stated that in the 1991 plan, the R-5-B portion of the site would be developed with residential uses, and a small portion of the indoor loading berth which would serve both the residential and nonresidential uses.

41. The regulations allow the Board to impose requirements pertaining to design, appearance, screening, location of structures, lighting or other requirements it deems necessary to protect adjacent or nearby property. As further set forth later in this order, the 1991 plan as revised by the plan set forth in the applicant's July 1, 1991 submission to the Board would adequately protect adjacent and nearby property.

42. The architect testified that the design of the 25th Street facade in the 1991 plan, including that portion located in the R-5-B zone, was residential in nature and would be compatible with the other rowhouses along 25th Street, and had a height of 77 feet 9 3/4 inches. The architect stated that, in the 1991 plan, 87 percent of the 25th Street frontage on the site would be below the permitted zoning height, and only 13 percent would be above such permitted height. The average building height along the 25th Street frontage permitted by zoning at the time of the 1991 hearing was 86 feet. The project was designed in the 1991 plans to a height of less than 78 feet along 25th Street, with a major portion of the building at 56 feet in height (the Luzon portion).

43. Special exception relief under Section 411.11 of the Zoning Regulations was necessary to approve the roof structure shown in the 1991 plans. The architect testified that the regulations would require that the roof structure be set back from all exterior walls a distance equal to its height, which in the 1991 plans was 14 feet. The 1991 plans met the setback requirements of 14 feet, with the exception of an area along 25th Street which was within 10 feet 8 inches of the setback of the edge of the roof related to the preservation of the historic building. The architect testified that the penthouse was set back substantially more than 14 feet from the property line. The penthouse in the 1991 plans was designed to be as small as possible, but the setbacks were constrained due to the preservation-oriented setback for the Luzon.

44. The architect testified that meeting the setback requirement in the 1991 plan would have been unduly restrictive and unreasonable. The proposed mixed use building in the 1991 plan required three elevators and associated mechanical space. For that building to function effectively, the penthouse could not be relocated any further. Even though technically the penthouse did not meet the setback requirements, the penthouse exceeded such setback requirements when measured from the property line.

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Therefore, light and air issues were not impacted. The strict application of this requirement would have required a sloped wall for a portion of the roof structure, which would have been architecturally inappropriate. In addition, the portion of the roof structure where the setback was not met contained the stair tower to the roof, which continued up from the lower floors; thus, relocating the stairs would have been unduly restrictive and unreasonable.

45. In response to issues related to fire safety in the 1991 plan, the architect submitted several memoranda in 1991 regarding fire safety and firefighting ability. These memoranda indicate that the Fire Department operating procedure does not include access across privately owned property, and that the block is adequately served by the existing public alley system, which would be left unchanged, and by the Pennsylvania Avenue and 25th Street frontages. The memoranda also indicated that the project was reviewed and the subject site was visited by the local Battalion Fire Chief of the Fire Station at 2225 M Street, N.W. which serves the subject site, and that he concluded that the proposed project would not negatively impact fire fighting abilities within the block.

46. The Office of Planning (OP), by report dated April 23, 1991, recommended approval of the 1991 plans. OP stated that the applicant's project met the burden of proof to be granted the requested variances and special exceptions. OP found that, given the design and site constraints created by the physical irregularities of the site as well as the historic preservation requirements, the proposed project was the most suitable development for the subject site. OP noted that the proposed design was more responsive to the neighborhood residential context by far than other buildings in the area, including the Westbridge. OP recommended that because historic preservation issues were so prevalent, the Board should leave the record open to receive the HPRB report and decision.

47. The transcript of the HPRB decision dated May 1, 1991 was entered into the record, indicating that the HPRB granted conceptual design approval to the project, but requested that the roof structure be further lowered. OP also testified about this matter at the public hearing.

48. The Department of Public Works (DPW) by report dated February 22, 1991, stated that the additional traffic generated by the proposal could be accommodated by the existing street system. The report indicated that because the Luzon is a historic landmark no parking or loading is required, although the 1991 plan included both parking spaces and loading facilities. The report further stated that trucks presently service the site through the existing alley. DPW stated it had no objection to the application.

49. By report dated March 14, 1991, the Fire Department stated it had no objection to the development.

50. By report dated March 21, 1991, the Department of Finance and Revenue stated it had no objection to the application.

51. By letter dated January 28, 1991, the Police Department stated that the proposed addition would not adversely affect the public safety in the vicinity of the subject site and would not create an increase in demand for public services. The Police Department stated it did not oppose the development request.

52. Advisory Neighborhood Commission (ANC) 2A, by testimony and written report presented at the hearing, opposed the 1991 plans for the project. The ANC stated that it was opposed to the degree of deviation of the project from the matter of right development standards. The ANC testimony indicated that the C-2-C zone district regulations require that a certain amount of residential space be built. The ANC stated that these deviations decreased the predominantly residential character of the square. Other issues raised by the ANC included:

A. Access by fire and other emergency vehicles to the inner core of the block would be reduced by the closure of the "alleyway" from 25th Street, NW;

B. Access to the proposed loading dock would create congestion at peak times, increase pedestrian hazards when trucks back up, and substantially increase noise levels;

C. On-street parking would be reduced; and

D. A large number of the residential units would lose privacy, quiet, light, sun, and views to varying degrees, including the windows in a light well of the adjacent rowhouse-type condominium apartment building in the R-5-B district along 25th Street, N.W.

53. The ANC stated there was also "anecdotal" evidence that the public may have a vested right to the "alleyway" along the northern edge of the subject site. The ANC recommended that the Board have the appropriate District office investigate the issue of adverse possession.

54. By report dated February 25, 1991, ANC 2E supported the position of ANC 2A in opposition to the 1991 plans for the project. The ANC report failed to meet the requirements of Section 3307 of the Zoning Regulations.

55. By testimony at the hearing, ANC 2B spoke in opposition to the 1991 plans for the project. The report of the ANC does not meet the requirements of Section 3307 of the Zoning Regulations.

56. Numerous letters of support for the 1991 plans for the project were submitted by adjacent property owners, local businesses and residents of the area, including residents of the Westbridge.

57. A number of neighborhood residents, many living in the Westbridge condominium, several of which were represented by counsel, presented a panel in opposition to the 1991 plans for the project. Reasons for opposition included the project's mass and scale, traffic, impacts upon the 25th Street condominium apartments, fire safety considerations, and opposition to blocking the "alleyway" on former Lot 61. The opponents stated that the split-zoned site required that 72 percent of the project be residential and that the developer was decreasing the amount of residential provided. Concern was expressed that only corporate-sized units were being provided in the 1991 plans. Counsel for the residents raised the issue that the "self-imposed hardship" standard applies to area variance cases, such as the subject application.

58. Several residents of the adjacent townhouse condominium apartment buildings along 25th Street also opposed the 1991 plans for the project. In addition to the above, the primary concern was that the project would block certain windows within a closed court on the adjacent apartment building.

59. By testimony at the 1991 hearing, the Foggy Bottom Association opposed the 1991 plans for the project because of the project's density, the impacts of new construction on adjacent structures, the fact that 25th Street is residential, and that the area is low scale in development.

60. A number of letters of opposition were also submitted to the record.

61. In light of the concern about blocking the windows of the light well in the adjacent 25th Street apartment building, the Board requested information concerning a matter of right development on the northernmost portion of the subject property, formerly known as Lot 61, and how development of the subject property would impact the windows on the property line of the apartment building at 1112 25th Street. The Board asked that the applicant and the Office of Planning consider zoning and building code issues related to the impacts of the development on the light and air provisions concerning this apartment building.

62. By submission dated May 17, 1991, and by testimony at the May 24, 1991 hearing, the applicant's architect provided the requested information regarding the matter of right development of former Lot 61 and the impacts of the project blocking windows of the adjacent rowhouse.

63. Based upon the architect's analysis and review of the existing conditions and the matter of right scheme, the architect presented a revised proposal for the 1991 plan which achieved the same result to the adjacent rowhouse as would occur under a matter of right development. The architect revised the 1991 plan to create a court niche on the subject site adjacent to the nonconforming closed court on 1112 25th Street to ensure light and air to the nonconforming closed court would not be impacted by the new development. To further maximize light within the court area, the architect testified that all faces of the court niche would be painted a light (white) color. In addition, the new court niche would be extended down below grade to align with the existing nonconforming closed court. This would result in an improvement over the existing condition on Lot 72, as it would double the size of the court at that level.

64. In terms of windows, the architect testified that the 1991 plan, as modified by the May 17, 1991 submission, would have the same impact as the matter of right scheme. The windows along the alley and the windows within the nonconforming court would remain unobstructed. The windows on the fourth floor addition would be blocked, just as they would under a matter of right development.

65. By supplemental report dated, May 20, 1991, OP stated that the applicant's modification minimizes possible adverse impact on the light and air flow in the existing closed court. The OP stated, however, that the applicant's modified plans created an open court, and not a court niche.

66. In response to concerns raised at the May 24, 1991 hearing, the Board requested that the Office of Planning schedule a meeting for all parties to discuss all of the issues one more time and to bring all interested parties up to date on the proposal, with an opportunity for compromises. Written submissions regarding the meeting were to be filed with the Board.

67. The Office of Planning conducted the meeting on June 4, 1991. At the meeting, the applicant agreed to a number of actions, including seeking a meeting on-site with representatives of the Police Department, Fire Department and DPW to discuss safety and access issues, and agreeing to explore modifications to the plans.

68. In its posthearing submission of July 1, 1991, the Applicant submitted photographs of the massing model prepared in

response to the request by the Board, as further embellished pursuant to the request of several neighbors. The massing model was prepared showing the building as presented during the public hearing with the court niche, and also showing a setback of 15 feet from the public alley in the R-5-B portion of the property. The model was displayed and discussed at the June 4, 1991 meeting with the community.

69. The applicant indicated in the 1991 posthearing report that after having analyzed the neighborhood concerns and the comments of the Board in more detail, and in order to respond to those concerns to the greatest extent possible, the applicant designed an alternate plan for the portion of the building in the R-5-B zone district adjacent to the closed court of the apartment building to the north of the site, at 1112 25th Street. The alternate plan indicated the western wall of the new construction as being flush with the easternmost portion of the closed court in order to maximize the light and air to the closed court on the neighboring building, and still provide a reasonable interior layout for the residential units on the subject site. The increase in setback at this portion of the building would result in a reduction in the overall FAR of the building to 5.85 (0.17 FAR above matter of right). Any further setback at this point would not have achieved any further opening of the closed court, and would have severely compromised the interior layout of the residential units in this portion of the project.

70. In addition, in order to maximize privacy in this location, the applicant offered in the 1991 posthearing submission not to put balconies along the western wall of the project adjacent to the light well. Under the definition of "gross floor area" in the Zoning Regulations, balconies projecting up to six feet from the face of the new project could be placed at this location without generating any additional FAR in the project.

71. The applicant's posthearing submission indicated that, as requested by the community, the applicant agreed that the leases for the residential units in the project would specify a duration of at least 12 months. In terms of unit size, the applicant stated that he intended to respond to market demand for unit size, at the time the project moved forward.

72. The applicant's posthearing submission indicated that the applicant would work with the engineers as the penthouse machinery is designed, to further lower the penthouse. In its 1991 conceptual design approval, the HPRB requested the applicant to work to lower the height of the penthouse. As a penthouse height is lowered, its footprint spreads out. The architects indicated at the June 4, 1991 meeting that they would be seeking a way to lower the penthouse height and decrease the footprint at the same time.

73. By submission dated July 1, 1991, parties in opposition filed their posthearing submission. The submission indicated that the project was too dense, and that the project would increase congestion in the alley and impede fire safety operations.

74. Based upon the evidence and testimony, on September 4, 1991, the Board voted 5-0: (Charles R. Norris, Sheri M. Pruitt, Paula L. Jewell, Maybelle Taylor Bennett and Carrie L. Thornhill) to approve the 1991 plan, subject to the following conditions:

A. Construction shall be in accordance with the plans marked as Exhibit No. 52 of the record as modified by Sheet SK2 of Exhibit No. 110I of the record.

B. No balconies shall be constructed on the western wall of the project.

C. Leases for residential units in the project shall be for a minimum term of 12 months.

D. The applicant shall have the flexibility to modify the height of the penthouse and to make design modifications as required by the Historic Preservation Review Board or the Mayor's Agent in compliance with D.C. Law 2-144.

Settlement Agreement and 1993 Plans

75. By letter dated November 25, 1992, counsel for the applicant requested the Board to exercise its authority to reopen the record in this case and conduct a further hearing on designated issues. The letter indicated that a settlement agreement was pending, which required a modification of the approved 1991 plans, reflecting interior reconfigurations and a reduced height and FAR.

76. At its public meeting of April 7, 1993, the Board exercised its authority, on its own motion prior to issuing an order, to authorize a further hearing limited to the issue of the revised plans for the project. Notice of the further public hearing was sent on April 29, 1993 to all parties in the case, and to ANCs 2A, 2B, 2E, and to the applicant.

77. At the further hearing, the applicant testified that subsequent to the Board's 1991 vote of approval, litigation was instituted challenging a number of aspects of the project. Subsequently, the applicant and members of the opposition entered into settlement discussions, which culminated in a Settlement Agreement governing a number of different aspects of the project. The Settlement Agreement obligates the applicant to return to the Board with a modified plan to reduce the approved building by one story, with a reconfiguration of uses within the building. The entire sixth floor will be devoted to residential use. In

addition, there will be residential use at three levels accessible from 25th Street at the north end of the project (basement, first and second floors). The applicant is obligated to devote a minimum of approximately 48 linear feet of ground floor street frontage along Pennsylvania Avenue (24 linear feet on each side of the building entrance), to a minimum depth of approximately 16 feet, to retail/service uses. The remainder of the building will be devoted to any nonresidential use permitted in the C-2-C zone district although the applicant will use best efforts to have the ground floor occupied for permitted retail/service uses. The applicant will restore the Luzon Building in accordance with the plans as approved for issuance of a building permit, and the development plan will remain essentially unchanged if the Luzon Building is damaged before or during construction, or prior to occupancy, including but not limited to the construction of the underground garage. The agreement to devote 48 linear feet of retail/service uses, and to restore the Luzon in accordance with the building permit plans, will be subject to covenants to be recorded on the Land Records of the District of Columbia. The Settlement Agreement also addresses a number of issues raised during the course of the public hearing in 1991. The applicant testified that the plan modifications are intended to address, to the greatest extent possible, all the legitimate issues expressed by the community.

78. The applicant's expert architect witness described the revised building design and interior layouts, as reflected in the 1993 plans, and the justifications therefor. The reduction by one floor required a redesign to make the building architecturally proportionate. The redesigned building improves upon the residential character of the architecture, and responds to the architecture of the historic landmark buildings in the block.

79. The architect testified that as a result of the changes reflected in the 1993 plans, the areas of zoning relief have been reduced from six to four as follows:

A. Variances

1) Residential recreation space - variance eliminated.

2) Percentage of lot occupancy - variance already approved by the Board.

3) Rear yard - variance already approved by the Board.

4) Floor Area Ratio.

a. Total FAR - Variance eliminated.

b. Nonresidential FAR - the proposed nonresidential FAR exceeds that approved by the Board, by 12,321 square feet, approximately the area of one floor.

B. Special exceptions

1) Roof structure setback - special exception eliminated.

2) Extend use, height and bulk regulations from C-2-C to R-5-B - The Board has previously approved the same bulk, and a greater height, than that proposed in the 1993 plans. The 1993 plans include a mixture of 53 percent residential and 47 percent nonresidential in the 20-foot section of the building which is zoned R-5-B.

80. The architect testified that in addition to the previous exceptional situations affecting the site, there are four new exceptional situations or conditions unique to the site as follows:

A. Recent studies to assess the full impact of the requirement to retain the full landmark building, including the original wooden interior structure, and provision of remedial noncombustible interior structural redundancy necessary for code compliance indicate that these measures significantly increase the construction cost and extend the construction duration significantly over what was originally anticipated.

B. The HPRB's subsequent denial of a 12-foot tall penthouse on this structure after the Board approval of the 14-foot penthouse in 1991, coupled with the reduction of the building by one floor, results in a need to lower the penthouse even further, so that it is not visible from street level. The reduction of penthouse height has caused a substantial redesign, and has caused the reduction of one elevator from the building.

C. Recent soil borings completed in 1993 after the site clearing indicated rock at a higher elevation than indicated in previous studies. Based on the new borings, approximately 15,000 cubic feet of additional rock excavation is required.

D. The Settlement Agreement achieved with the community is comprehensive, and places additional restrictions on the physical configuration of the building, and includes a number of other features.

81. The architect testified that the necessary reduction in height and footprint of the penthouse caused the elimination of one elevator from the building. With two elevators in the 1993 plan, instead of three, the nature and mix of uses within the building of necessity had to change. Both elevators will be devoted to commercial use, with one of the two elevators also available for residential use. The architects maximized the amount of residential space accessible directly from the street, without elevators, by increasing the number of units along 25th Street from one to four. The reduction of one elevator has eliminated the ability to provide mixed uses on each floor, with separate elevator lobbies. The top two floors of the building are radically different in footprint, and therefore the ability to stack residential units on these two floors is lost. All of these factors resulted in the residential configuration as shown on the 1993 plans.

82. With the limitation on elevator service and the dissimilarity of the top two floors, the requirement for more residential space would be a practical difficulty from a physical perspective. The height reduction in the 1993 plan has resulted in a loss of overall area in the building to a point not only less than previously approved, but also less than that allowed in the regulations. This is combined with the greater cost for preserving the structure and the greater anticipated cost for removal of subsurface rock, to impose severe financial limitations on the project. The 1993 plan, with the building reduced by one floor, with a reduced penthouse, with one less elevator, with four residential units on 25th Street, with the other conditions imposed by the Settlement Agreement, with the additional rock, and with the additional cost for building retention, is a development that is no longer physically achievable or economically viable within the mix and configuration of uses previously approved by the Board in 1991, or within the matter of right regulations.

83. The applicant testified that the extension of 47 percent nonresidential use into the 20-foot wide section of R-5-B property will have no adverse affect on the present character and future development of the neighborhood. The 1993 plan has residential uses on four of the seven floors within the R-5-B zone district. While the 1993 plan has 2,600 square feet of residential within the R-5-B portion, the amount of residential use accessible from 25th Street has quadrupled in the 1993 plan to 4,200 square feet. The residential use is appropriately located at the street level (basement, first and second floors) between the property line to the north, and the logical terminous of the parking garage entrance to the south. The commercial uses in this portion of the building are at the third, fourth and fifth floor levels, which will not interfere with the residential character at the street level.

84. The Office of Planning, by report dated June 2, 1993, recommended approval of the modified application. OP concluded

that the applicant is faced with practical difficulties, and that the proposed project is the most suitable development for the site. OP also believes that the use, height, bulk and design of the project would be in harmony with the use, height, bulk and design of other properties and structures in the surrounding neighborhood. OP concluded that the applicant has met its burden of proof.

85. Councilmember Jack Evans (Ward 2), by letter dated June 3, 1993, indicated his support for the revised development proposal, because it successfully balances several issues of concern to the Foggy Bottom and West End neighborhoods.

86. The testimony of record indicates that on January 14, 1993 ANC 2A voted 3-1, with 2 members absent, to support the revised application. However, under the ANC's internal rules, this does not represent a quorum, the ANC did not take an official position, and did not forward a written report to the Board.

87. Letters of support were received from Commissioner Sara Maddux, ANC 2A06; Commissioner Westy McDermid, ANC 2E04; and Commissioner Dennis Bass, ANC 2B04; in support of the application. Commissioner Chris Lamb, ANC 2A02; testified in support of the application.

88. Four parties to the application, who were previously opposed, testified in support of the revised application. These four individuals were part of the group which negotiated the Settlement Agreement with the applicant. Their testimony indicated that the neighbors at the Westbridge and on 25th Street, adjacent to the development site, strongly support the revised proposal. The revised proposal satisfactorily addresses the issues previously raised by the community in opposition, including neighborhood character, scale and safety. The Settlement Agreement includes various protections related to all of these areas of concern, and reduces the number of areas of zoning relief. The testimony indicated that the revised proposal is a reasonable compromise, given the number of different considerations discussed.

89. Six letters of support from parties, and a number of other letters of support from persons, were submitted into the record. One letter of opposition was submitted by a person, not a party to the application.

FINDINGS OF FACT:

Based upon the evidence of record, the Board makes the following findings of fact:

1991 Plans

1. As to the procedural matters raised at the 1991 hearings, the Board finds that Section 2514.2 applies to a "lot" and that under the Zoning Regulations, a lot is defined more broadly than just a record lot. The Board finds that the advertisement of the case, as amended, is proper.

2. The Board finds that, in the 1991 hearings, the applicant sought area variance relief from the lot occupancy, rear yard, floor area ratio (FAR) and residential recreation space requirements, and special exception relief for the roof structure and to allow the zoning limitations of the C-2-C District to be applied to the R-5-B portion of the lot, in order to construct the project.

3. The testimony and evidence of record indicates, and the Board finds, that the exceptional situations or conditions affecting the site result from a combination of various factors specific to the subject property. These factors are the physical configuration and attributes of this site, the existence of a historic structure on this site and the impact of rock conditions as they relate to the landmark, all of which combine to constitute exceptional conditions affecting the property. Specifically, the Board finds:

A. The landmark structure is a regularly shaped rectangular building on an irregularly shaped angular corner lot, creating inefficiencies in the layout of any structure on or addition to the site.

B. The existence of the landmark structure with its particular design and layout creates design constraints which represent an exceptional condition, limiting any new development of the site in terms of architecture, site planning and development.

C. The site is impacted by subsurface rock conditions that require blasting to construct the two level below grade garage. To excavate deeper than two levels is not practical since it would jeopardize the existence of the historic Luzon Building and could also effect abutting buildings.

D. The particular and exceptional design of the landmark Luzon Building requires special treatment in the design of the proposed addition, particularly the need to keep the building addition lower than matter of right zoning would allow, the need to set back the addition from the landmark building to make the Luzon appear as a separate

structure, and the construction of the addition on an irregularly shaped portion of the lot to be compatible with the Luzon.

The Board also finds that the presence and configuration of the historic landmark, the physical characteristics of the site and the rock conditions present practical difficulties to the owner in developing the project.

4. The Board finds that the provision of a rear yard on the site would result in a 15-foot wide strip running the full depth of the site adjacent to the five-story landmark townhouses to the west of the site. The open strip would be inappropriate and would result in practical difficulties.

5. The Board finds that in order to respect the historic landmark in a manner consistent with the historic preservation law, the building addition that would normally be placed at the front corner of the site (the location of the historic structure) has been shifted into the rear yard.

6. Based upon the evidence and testimony, the Board finds that compliance with the lot occupancy requirement would result in practical difficulties to the applicant due to the presence of the existing historic landmark.

7. The Board finds that additional costs and added inefficiency of preserving a historic structure, with associated set backs and historic preservation-oriented design changes, represent a practical difficulty to the applicant in complying with the requirements for FAR in the 1991 plan.

8. The Board finds that complying with the residential recreation requirements in the 1991 plan imposes a practical difficulty upon the applicant. In order to maximize efficiency and minimize excess bulk in the 1991 plan, the Board finds that the residential recreation space could not be placed in the above grade space including the main roof level. The Board further finds that there would be no adverse impacts from the reduction in on-site recreational space.

9. The Board finds that the proposed project in the 1991 plan, without the rear yard, would be appropriate and would continue the streetscape rhythm along Pennsylvania Avenue, N.W. Provision of the rear yard in the 1991 plan would make the continuity of the streetscape and the continuity of the retail space along Pennsylvania Avenue impracticable. The construction of the addition as shown in the 1991 plan would impose no new conditions over the existing situation since the historic Luzon Building is presently nonconforming as to rear yard.

10. The Board finds that the proposed project in the 1991 plan would have no impact on adjacent yards.

11. The Board finds that through sculpting as described in Summary of Evidence No. 34 the additional FAR would not result in a "bulkier" building.

12. The Board finds that the self-imposed hardship standard is not applicable in this case.

13. The Board finds that the extension of the use, height and bulk requirements of the C-2-C District into portions of the site in the R-5-B District is in compliance with 11 DCMR 2514.2.

14. The Board finds that the proposed roof plan in the 1991 plan was consistent with the intent and purpose of Section 411.11 of the Zoning Regulations. The proposed roof plan was designed so as to provide the maximum setbacks possible from the building and the penthouse setbacks exceed the requirements as measured from the property line. The light and air of adjacent buildings would not be affected.

15. The report of Advisory Neighborhood Commission (ANC) 2A meets the requirements of Section 3307 of the Zoning Regulations. The reports of ANC Commissions 2E and 2B do not meet the requirements of Section 3307.

16. The Board finds that the posthearing alternate plan design for the portion of the building in the R-5-B District adjacent to the nonconforming closed court of 1112 25th Street to be the appropriate solution as set forth in the Summary of Evidence of Record Nos. 69 and 70.

17. The Board finds that the applicant's posthearing submission in 1991 satisfactorily addressed the issues regarding the Police Department, Fire Department and DPW. In addition, the submission satisfactorily addressed the other issues raised at the OP meeting of June 4, 1991 regarding traffic, alley access for emergency vehicles, loading access both to this project and to other properties, trash removal, and access to parking.

18. The Board is required to give "great weight" to the issues and concerns of the ANC. In addressing ANC 2A's concerns, (and those of ANC 2B and 2E) regarding the 1991 plan, and the concerns of members of the community in opposition to that plan, the Board finds the above Findings of Fact to be responsive to the issues and concerns raised in addition to the following:

A. Based upon the evidence of record, the Board finds that the proposed height and density of the 1991 plan are appropriate given the subject site's location. The

project is located in an area of varying heights and the project has been designed to be compatible with its surroundings. Further, the Board finds that the design of the 1991 plan is sensitive to the landmark Luzon Building and to the other buildings in the area. The Board finds that the 1991 plan, which is more than 12 feet below the permitted matter of right height for the majority of the subject property, will not have an adverse impact upon adjacent properties.

B. As to the concerns expressed by the ANC and others regarding fire safety and alley access, the Board finds that those issues have been adequately addressed by the Fire Department and DPW, and concurs with those agencies.

C. The Board finds that the applicant has demonstrated that its parking and loading demand can be met without impacting the adjacent properties.

D. The Board finds that the unimproved portion of the subject property, known as former Lot 61, is private property.

E. The Board finds that the 1991 plan, as conditioned herein, is appropriate and will adequately protect adjacent and nearby property.

19. Based upon the evidence and testimony, on September 4, 1991, the Board voted 5-0 (Charles R. Norris, Sheri M. Pruitt, Paula L. Jewell, Maybelle Taylor Bennett and Carrie L. Thornhill) to approve the 1991 plan, subject to the following conditions:

A. Construction shall be in accordance with the plans as marked as Exhibit No. 52 of the record as modified by Sheet SK2 of Exhibit No. 1101 of the record.

B. No balconies shall be constructed on the western wall of the project.

C. Leases for residential units in the project shall be for a minimum term of 12 months.

D. The applicant shall have the flexibility to modify the height of the penthouse and to make design modifications as required by the Historic Preservation Review Board or the Mayor's Agent in compliance with D.C. Law 2-144.

Settlement Agreement and 1993 Plans

20. The Board finds that the applicant and members of the opposition entered into a Settlement Agreement. The agreement obligates the applicant to a number of strict controls over developing the site as enumerated in Summary of Evidence of Record No. 77.

21. The Board finds that as a result of the changes reflected in the 1993 plans, the areas of zoning relief have been reduced from six to four as set forth in Summary of Evidence of Record No. 79.

22. In addition to the exceptional situations or conditions affecting the site as stated under Finding of Fact No. 3, the Board finds four new exceptional situations or conditions unique to the site as stated by the applicant's architect in Summary of Evidence of Record No. 80.

23. The Board finds that the previously approved FAR of 5.85 has been reduced to 5.26 in the 1993 plans. The revised plans include 4.07 FAR of nonresidential use, which is 1.2 FAR greater than that approved by the Board. This additional FAR is a direct result of the need to lower the building and shrink the penthouse size.

24. The Board finds that a strict application of the regulations would impose a practical difficulty based on Summary of Evidence of Record Nos. 81 and 82.

25. The Board also finds that relief can be granted without substantial detriment to the public good, and without substantially impairing the intent, purpose and integrity of the Zoning Regulations. The 1993 plans provide for residential continuity on 25th Street, with a significant residential component at the street level, including the basement, first and second floors. The building has a distinctly residential character through its architectural design. The building height is limited to 70 feet for the building and 78 feet overall, which is less than 75 percent of the allowable height for the building and penthouse together. The execution of the Settlement Agreement is another indication of the revised plan as consistent with the public good.

26. The Board finds that the extension of the nonresidential use into the 20-foot wide section of the R-5-B zoned portion of the site will have no adverse affect on the present character and future development of the neighborhood as stated in Summary of Evidence of Record No. 83.

27. Based upon the architect's testimony and the evidence of record, the Board also finds that the conditions previously imposed by the Board on the 1991 approval are adequate to protect adjacent and nearby properties.

28. The Board finds that several individual ANC Commissioner's wrote letters in support representing ANC 2A, 2B and 2E. Four parties to this case who were previously opposed, testified in support of the revised application.

29. The Board finds that notice and an opportunity to participate either in person, or in writing, was given to all parties to the application regarding the 1993 plans, and that no party appeared, either in person or in writing, in opposition to the revised application at the further hearing.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact, and the evidence of record, the Board concludes that the applicant is seeking three variances and one special exception for the project as reflected in the 1993 plans. The variances relate to the rear yard (774.1), lot occupancy (772.1) and floor area ratio (771.2). Granting of the variances requires a showing of practical difficulty upon the owner arising out of some unique exceptional situation or condition affecting the property, and that relief can be granted without substantial detriment to the public good and that it will not substantially impair the intent, purpose or integrity of the zone plan.

The special exception pertaining to the zone boundary crossing a lot requires a showing that the applicant has complied with the requirements of Subsection 2514.2.

The Board concludes that the applicant has met its burden in respect to the variances. The rear yard, lot occupancy, and FAR variances are necessitated by the exceptional circumstances affecting the site which render it unique as hereinabove found by the Board.. Due to the exceptional situations or conditions including the physical characteristics of the site, the presence of the landmark and the retention of the interior wood structure, the rock conditions, the HPRB rejection of the 12 foot penthouse, and the comprehensive Settlement Agreement with the community, the Board concludes that the strict application of the Zoning Regulations would impose a practical difficulty.

The Board concludes that the existence of a historic landmark on the site, and the special considerations for the addition imposed thereby, have been found by the D.C. Court of Appeals to constitute an exceptional situation or condition warranting variance relief. United Unions v. D.C. Board of Zoning

Adjustment, 554 A.2d 313 (D.C. 1989). The Board also concludes that the presence of existing structures on a site was found to be a basis for area variance relief in the case of Clerics of St. Viator v. District of Columbia Board of Zoning Adjustment, 320 A.2d 291, 294, (D.C. 1974).

The Board concludes that the D.C. Court of Appeals has also found that "the approval of a variance [is appropriate] where the uniqueness arises from a confluence of factors." Gilmartin v. D.C. Board of Zoning Adjustment, 579 A.2d 1164, 1168 (D.C. 1990).

In regard to the issue raised by counsel for the opposition that the "self-imposed hardship" standard applies to area variance cases, the Board notes that the D.C. Court of Appeals again in Gilmartin v. District of Columbia Board of Zoning Adjustment, 579 A.2d 1164, 1169, specifically stated that ".... prior knowledge or constructive knowledge that the difficulty or hardship is self-imposed is not a bar to an area variance ...." Further, the Court stated that the exceptional situation or condition "... need not have preceded the promulgation of the zoning regulation."

The Board concludes that the applicant has met the burden for the granting of the special exception pertaining to the boundary zone crossing the lot. The applicant's modified plans provide light and air to the light well of the adjacent penthouse. The height and design of the project is consistent with the character of the rowhouses along 25th Street. The mix of uses in this portion of the building is such that the residential uses are appropriately located at the street level, thereby contributing to the residential character of the streetscape to the maximum extent possible. The commercial uses in this portion of the building will be located in floors three through five, and will be accessed from the Pennsylvania Avenue lobby, and not from 25th Street.

The Board further concludes that the application can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan. The relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and will not tend to affect adversely the use of neighboring property.

Accordingly, it is hereby **ORDERED** that the application is **GRANTED SUBJECT** to the following **CONDITIONS:**

1. Construction shall be in accordance with the revised plans presented at the public hearing, marked as Exhibit No. F-22 of the record, with the following flexibility:

    a) Flexibility to modify the design as required by the Historic Preservation Review Board or the Mayor's Agent in compliance with D.C. Law 2-144.

b) Flexibility to modify the number of residential units, subject to tenant demand, provided that the gross floor area devoted to residential use is as shown on the revised plan.

c) Flexibility to devote a minimum of 48 linear feet of ground floor street frontage (24 linear feet on each side of the building entrance) to a minimum depth of 16 feet (as shown on the revised plan) or any amount greater than that, to permitted retail/service uses.

d) Flexibility to devote the remainder of the building to any permitted use in the C-2-C zone district.

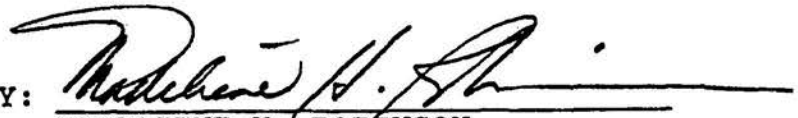
e) Flexibility on any of the above conditions, to comply with applicable code and regulatory requirements.

2. No balconies shall be constructed on the western wall of the project.

3. Leases for residential units in the project shall be for a minimum term of 12 months.

VOTE: 3-0 (Paula L. Jewell, Sheri M. Pruitt and Angel F. Clarens to grant; Carrie L. Thornhill and Maybelle Taylor Bennett not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: 
MADELIENE H. ROBINSON
Director

FINAL DATE OF ORDER: AUG 13 1993

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

ord15461/rcl/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15461

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on AUG 13 1993 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Christopher H. Collins, Esq.
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Madeliene H. Robinson

MADELIENE H. ROBINSON
Director

DATE: AUG 13 1993.

1546latt/LJP

2

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15461 of Chatham Lake Associates, as further amended, pursuant to 11 DCMR 3108.1 and 3107.2 for a special exception under Subsection 2514.2 to allow the regulations applicable to that portion of a lot located in a less restrictive use district to be extended to that portion of the lot in a more restrictive use district, a variance from the percentage of lot occupancy requirements (Subsection 772.1), a variance from the floor area ratio limitation for other permitted uses (Subsection 771.2), and a variance from the rear yard requirements (Subsection 774.1) for construction of a mixed use residential/commercial building in the C-2-C and R-5-B districts at premises 2501 Pennsylvania Avenue, N.W. [Square 14, Lot per subdivision (Lots 800 and 812)].

HEARING DATES: February 27, 1991, April 24, 1991, May 24, 1991 and June 9, 1993

DECISION DATES: September 4, 1991 and June 9, 1993

DISPOSITION: On September 4, 1991, the Board GRANTED the application, with CONDITIONS, by a vote of 5-0 (Charles R. Norris, Sheri M. Pruitt, Paula L. Jewell, Maybelle Taylor Bennett and Carrie L. Thornhill to grant). On June 9, 1993, the Board GRANTED the application, as further amended, with CONDITIONS, by a vote of 3-0 (Paula L. Jewell, Sheri M. Pruitt and Angel F. Clarens to grant; Carrie L. Thornhill and Maybelle Taylor Bennett not present, not voting).

FINAL DATE OF ORDER: August 13, 1993

MODIFICATION ORDER

The Board granted the application by its order dated August 13, 1993 subject to three conditions. By letter dated January 14, 1994, counsel for the applicant filed a timely request for modification of the plans originally approved by the Board.

The proposed modification of plans would result in the modification of the window design and the location of the loading door and fire exits on the north elevation and the removal of the windows along the top floor and vertically down the rear portion of the west elevation. The proposed modification of plans is intended to make the approved plans consistent with the Board's condition requiring the removal of balconies on the north elevation and the revised floor plans contained in the plans marked as

Exhibit No. F22 of the record. In all other respects the plans remain as approved. No further zoning relief is required. There was no opposition to the proposed modification of plans.

The Board waived Subsection 3335.6 of the Board's Rules which provides that no member shall vote on a request for modification of plans unless the member participated in and voted on the original decision. The membership of the Board has changed since the original decision in this application. Those Board members who did not participate in the original decision on this application were provided with copies of the transcript and record of the subject case for review prior to consideration of the request for modification of plans.

Upon review of the request for modification of plans, the record of the case, and its final order, the Board concludes that the proposed modification of plans is generally cosmetic and minor in nature. The proposed modification of plans does not alter the material facts relied upon by the Board in deciding the application. No additional zoning relief is required. It is therefore ORDERED that the proposed MODIFICATION OF PLANS is hereby APPROVED, SUBJECT to the CONDITION that the north and west elevations of the building shall be constructed in accordance with the plans marked as Exhibit No. F41A of the record. In all other respects, the order of the Board dated August 13, 1993, shall remain in full force and effect.

DECISION DATE: February 2, 1994

VOTE: 4-0 (Angel F. Clarens, Maybelle Taylor Bennett and Craig Ellis to approve; Laura M. Richards to approve by absentee vote; George Evans not voting, not having read the record).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Madeliene H. Robinson
MADELIENE H. ROBINSON
Director

FINAL DATE OF ORDER: MAR 7 1994

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

15461ord/SS/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15461

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on MAR 7 1994 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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Geoffrey Tyler
Foggy Bottom Historic District Conservancy
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Madeliene H. Robinson

MADELIENE H. ROBINSON
Acting Director

DATE: MAR 7 1994

3

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15461 of Chatham Lake Associates, as further amended, pursuant to 11 DCMR 3108.1 and 3107.2 for a special exception under Subsection 2514.2 to allow the regulations applicable to that portion of a lot located in a less restrictive use district to be extended to that portion of the lot in a more restrictive use district, a variance from the percentage of lot occupancy requirements (Subsection 772.1), a variance from the floor area ratio limitation for other permitted uses (Subsection 771.2), and a variance from the rear yard requirements (Subsection 774.1) for construction of a mixed use residential/commercial building in the C-2-C and R-5-B districts at premises 2501 Pennsylvania Avenue, N.W. [Square 14, Lot per subdivision (Lots 800 and 812)].

HEARING DATES: February 27, April 24 and May 24, 1991 and June 9, 1993

DECISION DATES: September 4, 1991, June 9, 1993 and February 2, 1994

DISPOSITION: The Board on September 4, 1991, GRANTED the application with CONDITIONS by a vote of 5-0 (Charles R. Norris, Sheri M. Pruitt, Paula L. Jewell, Maybelle Taylor Bennett and Carrie L. Thornhill to grant). On June 9, 1993, the Board GRANTED the application as further amended with CONDITIONS by a vote of 3-0 (Paula L. Jewell, Sheri M. Pruitt and Angel F. Clarens to grant; Carrie L. Thornhill and Maybelle Taylor Bennett not present, not voting). On February 2, 1994, the Board APPROVED a MODIFICATION OF PLANS by a vote of 4-0 (Angel F. Clarens, Maybelle Taylor Bennett and Craig Ellis to approve; Laura M. Richards to approve by absentee vote; George Evans not voting, not having read the record).

FINAL DATES OF ORDER: August 13, 1993 and March 7, 1994

MODIFICATION ORDER

The Board initially granted the application by its order dated August 13, 1993. By Order dated March 7, 1994, the Board approved a modification of plans in the application. By letter dated October 16, 1996, counsel for the applicant filed a motion to waive the six-month filing requirement to allow for the filing of a request for further modification of plans.

The application was originally approved by the Board as a mixed use six-story building, incorporating the existing vacant five-story historic Luzon building, with residential use on the sixth floor of the new building, as well as three levels of residential use in the northernmost portion of the new building, fronting on 25th Street, N.W. In the proposed modification, the applicant would convert the sixth floor of the building from residential to commercial, and would convert a portion of the third floor from commercial to residential. The net change in square footage from residential to commercial would be 3,862 square feet. No additional areas of zoning relief are requested or required in this modification.

The applicant stated that after the project was approved by the Board, the owner of the project filed a building permit application, but was unsuccessful in the attempt to market the project to a number of prospective purchasers. The main impediment expressed by those potential purchasers was the residential use on the sixth floor of the building. Based upon discussions with a number of brokers, the property owner found that there was no market for a building of this configuration, with a single shared residential/office lobby serving five floors of commercial use and one floor of residential use. Potential lenders also informed the owner that they were unwilling to finance construction without substantial pre-leasing. The applicant noted that without an occupancy commitment by a tenant or buyer, the project cannot be financed, and the property will continue to sit vacant and unbuilt.

The applicant stated that the project was sold earlier this year to Castleton Holdings, Inc. for development. Castleton confirmed that the same financing and market impediments still exist. Castleton began an analysis of the building to determine what modifications would be necessary to make the project economically viable and to enhance its marketability. After discussions with brokers and lenders, as well as with Councilmember Jack Evans, the Office of Planning, the Historic Preservation Review Board staff, and certain community representatives that co-signed the 1993 settlement agreement for the project, Castleton decided to propose a conversion of the sixth floor residential component in the "townhouse" portion of the building on 25th Street by replacing approximately 1,400 square feet of third floor office space with residential space.[1] The revised plans also indicate the removal of the west and north walls of the existing building, which were to

[1] The revised plans also indicate the removal of the west and north walls of the existing building, which were to become interior and hidden walls in the completed project. Although this is reflected in the revised plans, it does not affect any of the zoning calculations for the project.

become interior and hidden walls in the completed project. Although this is reflected in the revised plans, it does not affect any of the zoning calculations for the project. The applicant maintains that this shift will better delineate the residential and nonresidential components of the building, maximizing the residential portion in a townhouse apartment configuration on the north part of the site on 25th Street, adjacent to the other townhouse apartments on that block. The complete separation of the residential and nonresidential portions of the building is also consistent with a number of other successful mixed-use buildings in the West End.

The applicant stated that given the small size of the building footprint, it is not feasible to add a second entrance, lobby and elevator core for residential units. Moreover, under the Building Code, it is not possible to put more than three above-grade levels (and one below-grade level) of walk-up residential units in the building without providing a second means of egress. Given the site constraints and limited building footprint, there is no room to provide the second means of egress.

With regard to the request for a waiver from Section 3335.3, to allow this modification request to be considered more than six months after the final date of the written order approving the application, the applicant stated that the original order was issued on August 13, 1993, and the modification Order was issued on March 7, 1994. The zoning approval was vested by the filing of a building permit application on June 14, 1994. The prior owner actively marketed the project until early in 1996, when Castleton purchased the project for development. After studying the project and reviewing the options with interested parties, Castleton is now in a position to move forward with the approval process, so that the project can be built.

The applicant believes that the proposed modifications are minor and do not change material facts the Board relied upon in approving the application. Therefore, the applicant requests approval of this modification of plans.

The Board received correspondence from some of the parties to the application.

By letter dated October 26, 1996, the Single Member District Commissioner for Advisory Neighborhood Commission districts 2A01, 2A02, 2A04 and 2A06 expressed their support for the project modification. They also submitted a resolution in support which was not voted on due to the lack of a quorum at the ANC meeting. The support in the resolution was conditioned upon the developer beginning construction within six-months of obtaining all historic preservation, zoning and building permit approvals.

The Board also received support letters from the Single Member District Commissioner for ANC 2E04, the President of the Board of Directors of the Westbridge Condominium Association, and two individual residents of the Westbridge Condominium.

No letters opposing the modification of plans were received by the Board.

Upon consideration of the motion for waiver of the six-month filing requirement and the circumstances related to the applicant's efforts to develop the property, the Board determines that the waiver should be approved.

Upon consideration of the request for modification of plans and the letters in support, the Board concludes that the proposed modifications are minor and do not change the material facts relied upon by the Board in approving the application. The Board further concludes that based on the market analysis conducted by the applicant, the modifications were necessary to make development of the property feasible. No additional zoning relief is required. Therefore, it is ORDERED that the proposed MODIFICATION OF PLANS is APPROVED and that plans marked as Exhibit No. 124 of the record shall be substituted for those plans originally approved and subsequently modified, marked as Exhibit No, F-22 of the record.

DECISION DATE: November 6, 1996

VOTE: 3-0 (Angel F. Clarens and Laura M. Richards to APPROVE the MOTION FOR WAIVER of the six month filing requirement; Maybelle Taylor Bennett to approve by absentee vote; Sheila Cross Reid not voting, not having heard the case; Susan Morgan Hinton not present not voting. not having heard the case).

VOTE: 3-0 (Angel F. Clarens and Laura M. Richards to APPROVE the MODIFICATION OF PLANS; Maybelle Taylor Bennett to approve by absentee vote; Sheila Cross Reid not voting, not having heard the case; Susan Morgan Hinton not voting not present, not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Madeliene H. Dobbins
MADELIENE H. DOBBINS
Director

FINAL DATE OF ORDER: FEB 3 1997

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

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15461ord/TWR/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15461

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on FEB 3 1997 a copy of the order entered on that date in this matter was mailed postage prepaid to each person who appeared and participated in the public hearing concerning this matter, and who is listed below:

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MADELIENE H. DOBBINS
Director

Date: FEB 3 1997

15461att/LJP

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15461 of Chatham Lake Associates, as further amended, pursuant to 11 DCMR 3108.1 and 3107.2 for a special exception under Subsection 2514.2 to allow the regulations applicable to that portion of a lot located in a less restrictive use district to be extended to that portion of the lot in a more restrictive use district, a variance form the percentage of lot occupancy requirements (Subsection 772.1), a variance form the floor area ratio limitation for other permitted uses (Subsection 771.2), and a variance from the rear yard requirements (Subsection 774.1) for construction of a mixed use residential/commercial building in the C-2-C and R-5-B districts at premises 2501 Pennsylvania Avenue, N.W. [Square 14, Lot per subdivision (Lots 800 and 812)].

HEARING DATES: February 27, April 24 and May 24, 1991 and June 9, 1993
DECISION DATES: September 4, 1991, June 9, 1993 and February 2, 1994

DISPOSITION: On September 4, 1991, the Board GRANTED the application with CONDITIONS by a vote of 5-0 (Charles R. Norris, Sheri M. Pruitt, Paula L. Jewell, Maybelle Taylor Bennett and Carrie L. Thornhill to grant). On June 9, 1993, the Board GRANTED the application as further amended with CONDITIONS by a vote of 3-0 (Paula L. Jewell, Sheri M. Pruitt and Angel F. Clarens to grant; Carrie L. Thornhill and Maybelle Taylor Bennett not present, not voting). On February 2, 1994, the Board APPROVED a MODIFICATION OF PLANS by a vote of 4-0 (Angel F. Clarens, Maybelle Taylor Bennett and Craig Ellis to approve; Laura M. Richards to approve by absentee vote; George Evans not voting, not having read the record). On November 6, 1996, the Board APPROVED a SECOND MODIFICATION OF PLANS by a vote of 3-0 (Angel F. Clarens and Laura M. Richards to approve; Maybelle Taylor Bennett to approve by absentee vote; Sheila Cross Reid not voting, not having heard the case; Susan Morgan Hinton not present, not voting, not having heard the case).

FINAL DATES OF ORDERS: **August 13, 1993, March 7, 1994 and February 3, 1997**

MODIFICATION ORDER

By order dated August 13, 1993, the Board granted the application. By order dated March 7, 1994, the Board approved a modification of plans in the application. By order dated February 3, 1997, the Board approved a further modification of plans in the application. By

letter dated June 17, 1997, Castleton-Projector, L.P. (Castleton), through counsel, requested a further modification of approved plans. Castleton noted that the original applicant was Chatham Lake Associates. However, Castleton purchased the project in 1996. Since that time, it has studied ways to improve the plans, to enhance the marketability of the project.

THE MOTION FOR RECONSIDERATION:

One of the parties to the application, Ms. Barbara Kahlow, submitted a letter dated June 23, 1997 requesting that the Board reconsider its decision of February 3, 1997. In a letter dated June 30, 1997, Castleton responded to the motion stating that 11 DCMR 3332.2 of the Board's Rules requires that a motion for reconsideration be filed within 10 days of the filing and service of the written order of the Board. Castleton stated that the order from which Ms. Kahlow seeks reconsideration was issued almost five months ago. Therefore, the motion is untimely.

Based on the motion for reconsideration, the response and the applicable rules, the Board concludes that the motion was filed in an untimely manner. The Board notes that no waiver of the Board's Rules was requested. Therefore, the merits of the motion for reconsideration will not be considered in this order.

THE MOTION FOR MODIFICATION OF PLANS:

In the request for modification of plans, the movant stated that last October, at Castleton's request, the Board approved a modification of plans to reallocate the residential space into one central location in the building. The approved building plans indicate that no windows are to be located along the exterior western wall. The approved plans also indicate a small ground floor retail space to the west of the building entrance, accessible from the street, with a separate adjacent internal building services space to the rear of that space, accessible from the lobby. Along with the motion, the movant submitted the existing approved plans for each of those features and the proposed modified plans.

Several timely letters were filed in opposition to the motion for modification of plans. They were received from Advisory Neighborhood Commission 2A, ANC SMD Commissioners for 2E-04 and 2A-06, Council Member Jack Evans, Barbara Kahlow, David Bowes and Michael Walden.

The Reduced Residential Component in turn for Quick Development of the Site:

In Ms. Kahlow's letter dated June 23, 1997, she stated that in 1996, the developer made written commitments with the community stating that "The developer commits to apply for and diligently pursue to completion, within a reasonable amount of time, all zoning, preservation, permit, and final building permit approvals....The Developer commits to a timetable to begin construction within 6 months of obtaining the Approvals and to use best efforts...to substantially complete the New Project within 2 years after construction begins." Ms. Kahlow stated that the applicant's 1996 modification called for a smaller residential component as compared to the previous plans. She noted that she supported that modification based on the developer's written

commitments on May 19, 1996. She stated that the neighbors still want a substantial residential component, consistent with how the property is zoned.

Ms. Kahlow noted that in February 1997, the developer cancelled the Mayor's Agent hearing scheduled for March 17, 1997, in violation of his written commitment. Ms. Kahlow is of the view that the developer now is trying to distort the Board's process and the current request for modification is an attempt by Castleton to further delay construction of the project which was promised to begin in a reasonable period of time.

A number of the other opponents to the motion expressed the same view about the movant's failure to keep the promises made. In light of the fact that the lot has not been developed in a timely fashion, these opponents reiterated their desire to have a substantial residential component at the site.

By letter dated July 28, 1997, ANC 2A submitted a resolution in opposition to the modification request. The ANC also made note of the cancelled Mayor's Agent hearing and stated that the movant has not yet rescheduled this hearing in a reasonable period of time. This is in spite of the fact that the applicant was aware that for the community time was of the essence. ANC 2A expressed the view that the current modification request is primarily intended to further extend the six months validity of the Board's order beyond the August 1997 expiration date, for a project which should have had a building permit no later than early 1994.

In a letter dated June 27, 1997, David Bowes requested that the Board not allow the developer to depart from written commitments made to the community about when and how the development would proceed. He reiterated the community's interest in a substantial residential component in the building and he pointed out that allowing modifications would take the process backward, rather than proceeding with what was settled upon and agreed to.

Council Member Jack Evans, by letter dated June 27, 1997 stated that he originally testified in opposition to the application in 1991. However, on May 29, 1996, he submitted a letter of support for a modification to the 1993 plan (which noted that the 1993 plan was based on a settlement agreement between the developer and the community). This 1996 plan called for a smaller residential component than approved by the Board in 1993. His support of this 1996 plan was based on a personal commitment made to him by the developer to develop the property quickly. He stressed the community's desire for a substantial residential component, given that the developer is not proceeding as promised.

By letter dated June 25, 1997, Sara Maddux, the Single Member District Commissioner for ANC 2A-06, opposed the modification request. She stated that the applicant has failed to honor its promise of prompt construction, therefore the community is renewing its original position for a substantial residential component in any development of this site.

Responding to the issue of quick development of the site specifically raised by Ms. Kahlow, Castleton stated that it intends to honor the terms of the written commitment to move forward "within a reasonable amount of time" to completion of the project. However, the movant and Ms. Kahlow disagree on the meaning of the term "reasonable". In the movant's

view, Ms. Kahlow would have Castleton build the project now on a speculative basis, without having first secured a tenant. The movant stated that this is not only unreasonable; it is impossible because in the current real estate market, one cannot secure a construction loan without significant pre-leasing to at least one major tenant.

The movant pointed out that the plan modifications requested by the applicant are intended to respond to issues raised in discussions with prospective tenants about the building. They are intended to reposition the building to appeal to the most active segment of the market. The need to secure a tenant prior to going forward has been the applicant's consistent message in all forums where the project has been discussed. The applicant stated that Ms. Kahlow has been in attendance at all of these forums and is aware of that fact.

The movant stated that it is vigorously marketing the project to a number of potential users. The modification requests are intended to make the building more attractive to those users. If Ms. Kahlow's request to deny the motion is granted, this will ensure that the property will continue to remain vacant and abandoned for the indefinite future. This would not be in the best interest of anyone, including Castleton, Ms. Kahlow or the District of Columbia.

Windows on the Western Wall:

Ms. Kahlow stated that the current modification addresses two issues: (a) the windows on the western wall and (b) the removal on an interior wall. She stated that the windows are in violation of the developer's written commitment and they would intrude upon the privacy of the neighboring residential units. In her view the windows do not make sense, since they would be blocked if the area behind the Mullett townhouses are developed. Such development is seriously being considered by the new owner of the immediately adjacent building to the west.

In a letter dated July 15, 1997, Michael Walden stated that he chaired the Westbridge Condominium Association's Committee on the 2501 Pennsylvania Avenue development proposals. Although that Committee opposed the proposals made around 1991, he and several of his neighbors supported the October 1996 modifications submitted by the new developer. With regard to the most recent modifications, he stated that he is most disturbed by the modification itself and the way in which it has been submitted. Therefore, he fully supports the views expressed by Ms. Kahlow in her letter.

Council Member Evans stated that the windows that were deliberately excluded from the prior plan, would intrude upon the privacy of the neighboring residential units. In his view such an invasion of privacy is problematic and should not be approved by the Board.

In correspondence submitted to the Board, Westy Byrd (ANC 4E-04) and Sara Maddux (ANC 2A-06) both agreed with the view that the windows would be an intrusion upon the privacy of the nearby residents.

Responding to the issue about the windows, Castleton stated that there is no written commitment by the developer regarding the presence or absence of windows on the western wall. These windows would be above the height of the adjacent buildings to the west. They

would face the Westbridge Condominium building, but that building is located more than 110 feet to the west of the subject property. Consequently, they would not "intrude upon the privacy of the neighboring residential units" as alleged by Ms. Kahlow.

Pursuant 11 DCMR 3335.2, "The Board shall consider requests to approve modifications to plans approved by the Board...." The standard for review appears in Subsection 3335.7 which states that "Approval of requests for modification of approved plans shall be limited to minor modifications that do not change the material facts the Board relied upon in approving the application." The movant maintained that the modifications requested are minor and do not change the material facts that the Board relied upon in approving the application. Therefore, Castleton requested that the motion be approved.

Upon consideration of the motion, the responses and the applicable regulations, the Board concludes that the movant has met the burden of proof for the motion filed. The Board concludes that the requested modifications are minor and do not change the material facts relied upon by the Board in deciding to grant the application. The Board is of the opinion that the windows will be an adequate distance away from the nearest residential structure. The Board notes that there was no opposition to the change in the interior wall and agrees with the movant that denying the modifications would futher delay construction at the site because of the inability to satisfy potential tenants.

Accordingly, it is hereby **ORDERED** that the **MOTION for RECONSIDERATION** be **DENIED** and that the **MODIFICATION of PLANS** be **APPROVED.**

DECISION DATES: September 3 and October 1, 1997

Vote: 3 – 0 (Susan Morgan Hinton, Sheila Cross Reid and Laura M. Richards to deny the motion for reconsideration; Betty King not voting, not having heard the case; Maybelle Taylor Bennett not present, not voting).

Vote: 3 - 1 (Maybelle Taylor Bennett, Susan Morgan Hinton and Sheila Cross Reid to approve the modification of plans; Laura M. Richards opposed to the motion).

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Madeliene H. Dobbins
MADELIENE H. DOBBINS
Director

Final Date of Order: MAR 31 1998

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR § 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT.

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

Ord15461/TWR

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15461

As Director of the Board of Zoning Adjustment, I certify and attest that on MAR 31 1998 a copy of the decision entered on that date in this matter was mailed first class, postage prepaid to each party in this case, and who is listed below:

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Attested By: Madeliene H. Dobbins
MADELIENE H. DOBBINS
Director

Date: MAR 31 1998

attest/ljp